

Symposium

FOREWORD: SYMPOSIUM ON ORDERING STATE-FEDERAL RELATIONS THROUGH FEDERAL PREEMPTION DOCTRINE

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This special issue of the *Northwestern University Law Review* brings together contributions from scholars and practitioners whose work focuses on preemption doctrine, or the theory of when and how federal law displaces state law. On April 5, 2007, nearly a dozen authors convened at the Northwestern University School of Law to discuss “Ordering State-Federal Relations Through Federal Preemption Doctrine.” The articles in this issue, although treating diverse areas of substantive law, share as a focus how preemption doctrine shapes the interplay of federal and state regulations.

Recent developments in the area of greenhouse gas regulation show that this examination of preemption doctrine is timely and important. At the start of this year, California filed a petition in the U.S. Court of Appeals for the Ninth Circuit seeking review of the EPA’s denial of a waiver of preemption under the Clean Air Act for California’s proposed greenhouse gas vehicle emissions regulations.¹ The Clean Air Act permits California to adopt more stringent emissions standards than those set by the EPA, provided that the EPA grants it a waiver of preemption²—something that, before last December, the EPA had done routinely and without exception for thirty years.³ In its denial, the EPA noted that a uniform federal solution is

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¹ See Petition for Review, *California v. EPA*, No. 08-70011 (9th Cir. Jan. 2, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf.

² The Clean Air Act preempts any state regulation of automobile emissions different from the standards mandated by the federal government. See 42 U.S.C. § 7543(a) (2006). However, it does allow California to adopt and implement stricter emissions standards than those set by the EPA so long as the EPA grants California a waiver of preemption. See *id.* § 7543(b)(1).

³ See John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1. The EPA denied California’s most recent application on

preferable and that a federal energy bill signed into law that same day mandating greater vehicle fuel efficiency by 2020 provides the preferred uniformity.⁴

The legal battle over California's waiver request has ramifications well beyond California. Under the Clean Air Act, other states have the option of following California's more stringent standards, provided that the EPA has granted California a waiver of preemption.⁵ As such, fifteen states and state environmental agencies have sought leave to intervene in the Ninth Circuit proceedings, on the ground that they have adopted or are in the process of adopting vehicle emissions rules identical to the California regulations.⁶ The EPA's denial of California's waiver request thus invalidates a uniform set of vehicle emissions rules in a group of states that, with California, accounts for more than half of the U.S. automobile market.⁷

Yet even if the EPA grants California a waiver, allowing California's vehicle emissions standards to escape preemption by the Clean Air Act, these emissions standards face potential preemption by the Energy Policy and Conservation Act (EPCA)—a federal statute that directs the National Highway Traffic Safety Administration to set fuel efficiency standards for automobiles sold in the United States. California's standards, by proposing to regulate greenhouse gas emissions to address the threat of climate change, would effectively raise fuel economy standards for cars sold in the state. Congress included in the EPCA an express preemption provision forbidding any state regulation that is "related to fuel economy standards."⁸ In the weeks leading up to the EPA's denial of California's waiver request, and in the aftermath of the Supreme Court's decision in *Massachusetts v. EPA*,⁹ two federal district courts held that California's rules (in one case, as adopted by Vermont) were not necessarily preempted by the federal

December 19, 2007. See Letter from Stephen L. Johnson, Administrator, EPA, to Arnold Schwarzenegger, Governor of California (Dec. 17, 2007), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epa-letter.pdf; see also California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

⁴ See Letter from Stephen L. Johnson, *supra* note 3.

⁵ See 42 U.S.C. § 7507.

⁶ See Motion for Leave to Intervene as Petitioners, California v. EPA, No. 08-70011 (9th Cir. Jan. 2, 2008), available at <http://www.oag.state.ny.us/press/2008/jan/9th%20Cir.%20Mot.%20Int..pdf>.

⁷ Broder & Barringer, *supra* note 3, at A1.

⁸ See 49 U.S.C. § 32,919(a) (2006) (prohibiting states from enacting a regulation that is "related to fuel economy standards or average fuel economy standards.").

⁹ 127 S. Ct. 1438 (2007).

EPCA.¹⁰ But preemption of state greenhouse gas regulations under the EPCA remains an open question.¹¹

This battle between a group of states and a federal agency (or two) highlights many of the pressing questions of preemption doctrine that are explored in this Symposium issue. Does preemption doctrine adequately respect the constitutional structure of federalism put in place by the Framers? Which governmental institutions should make preemption decisions—Congress, courts, or agencies? How much say, if any, should states have in the decision? Should the federal government's desire for uniformity and ease of administration trump state concerns? What other policies or rationales should be taken into account? Can insights from public choice theory or collective action theory inform preemption doctrine? Can we contextualize preemption, drawing from other areas of law to bring some coherence to the doctrine? Are there specific mechanisms—such as clear statement rules, notice requirements, or ripeness provisions—that Congress, courts, or agencies can use to improve preemption doctrine?

And, of course, while the saga of greenhouse gas regulation currently holds the nation's attention, in the modern administrative state, similar preemption issues arise in many other areas, including consumer health and safety regulation, labor and employment law, and economic regulation. At the live Symposium in April 2007, scholars, practitioners, and students participated in a spirited discussion about the status and future of preemption doctrine as it relates to these and other areas of substantive law. The articles in this issue reflect the ideas expressed at and developed through that Symposium. We hope that they afford useful, original insights on the unfolding debates surrounding preemption doctrine.

¹⁰ See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 350 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

¹¹ See, e.g., *Average Fuel Economy Standards For Light Trucks Model Years 2008–2011*, 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006) (stating that state regulations of greenhouse gases are preempted by the EPCA).

